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IN THE
Supreme Court of the United States

October Term, 1984

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, and BARBARA F. CLISBY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS SUPPORTING PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Introduction	1
I. THE IMPROPER AND SUBSTANTIAL EXPANSION OF *ALCOA'S* PRICE-SQUEEZE THEORY OF LIABILITY INVOLVES IMPORTANT ANTITRUST ISSUES	1
II. COLUMBIA'S PROCEDURAL ARGUMENTS DO NOT WARRANT DENIAL OF THE WRIT	2
A. The Petition Raises Important Questions of Antitrust Liability	2
B. The Issues Presented to This Court Were Preserved Below	3
III. *ASPEN SKIING* IS NOT RELEVANT	6
IV. WITHOUT PRICE SQUEEZE COLUMBIA'S CASE IS NOT SUFFICIENT TO WARRANT AFFIRMANCE	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Aspen Skiing Co. v. Aspen Highland Skiing Corp., ____U.S. ____, 105 S.Ct. 2856 (1985) 6

Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931) 9

Northeastern Telephone Co. v. AT&T, 651 F.2d 75 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) 10

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962) 10

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) 1

Statutes:

Sherman Act, Section 2, 15 U.S.C. §2 8

Rules:

Rule 17, Rules of the Supreme Court of the United States 2, 3

Books:

P. Areeda, *Antitrust Law* ¶729.9 at 227 (Supp. 1982) 9

REPLY BRIEF FOR PETITIONER

Respondents have presented no valid ground for denying the Petition. They do not rebut the importance of the issues presented, including the significance and adverse economic consequences of extending the "price-squeeze" theory of antitrust liability established in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d cir. 1945) *("Alcoa")*, to vertically integrated firms lacking unilateral monopoly power over the relevant raw material or other input product markets. Rather, repondents devote virtually all of their response to claims that are either erroneous, irrelevant, or both.[1]

I. THE IMPROPER AND SUBSTANTIAL EXPANSION OF *ALCOA'S* PRICE-SQUEEZE THEORY OF LIABILITY INVOLVES IMPORTANT ANTITRUST ISSUES.

Columbia correctly acknowledges that Kaiser's "principal contention" is that the court of appeals improperly expanded the "price-squeeze" theory of *Alcoa*. But, having acknowledged it, Columbia never addresses the contention. It does not dispute that the Third Circuit expanded the price-squeeze theory established in *Alcoa;* it offers no explanation why the Third Circuit's new price-squeeze test is correct; and it does not attempt to justify on any grounds "[t]he substantial expansion" and "significant extension" of the price-squeeze theory of antitrust liability. (A-4.) Instead, Columbia attempts to avoid Kaiser's legal contention by arguing that the price-squeeze issues are "fact bound." The argument begs the question of whether the Third Circuit's decision improperly expanded *Alcoa* by extending it to an integrated producer that concededly had no monopoly over the raw

1. Petitioners will hereafter be referred to as "Kaiser" and respondents as "Columbia."

material, but was only one of several substantial suppliers.[2]

The Third Circuit's decision is a dangerous and unwarranted extension of the *Alcoa* "price-squeeze" doctrine to non-monopoly price leadership. The Third Circuit's economically unsound and legally unsupported price leadership test is itself a good example of the problems that will arise from such an unwarranted extension of *Alcoa*.

II. COLUMBIA'S PROCEDURAL ARGUMENTS DO NOT WARRANT DENIAL OF THE WRIT.

Most of Columbia's Brief in Opposition attempts to obscure and avoid the merits of the petition by asserting procedural hurdles to review by this Court.

A. The Petition Raises Important Questions of Antitrust Liability.

There is no merit to Columbia's argument that the petition fails to satisfy the prerequisites of Rule 17 of this Court. The petition "presents vitally important antitrust issues" (Petition at 1, and *see* 26) regarding the "price-squeeze" doctrine which this Court has never resolved. The significance of these issues is highlighted by showing that the Third Circuit's decision is a "substantial," "dangerous" and "unwarranted" extension of the *Alcoa* "price-squeeze" doctrine to non-monopoly "price leadership" (Petition at 16-21). The Third Circuit's test is economically unsound, legally unsupported and certain to aggravate a recurring problem in the regulation of business activity. The decision invites a flood of "price

2. Columbia's statement that the record established that Kaiser had "dominant and monopolistic power in coil" (Opposition Brief at 12) totally ignores the failure of proof of the relevant raw material market. The court of appeals erroneously dispensed with this well established element of proof of monopoly power. *See* Petition at 24-25.

squeeze" cases. (Petition at 21-26.) Accordingly, Kaiser's petition demonstrates that "a federal court of appeals has decided an important issue of federal law which has not been, but which should be, settled by this Court." [Rule 17.1(c).]

Moreover, Kaiser repeatedly contends that the Third Circuit's opinion is at odds with *Alcoa*, because critical elements there are missing in this case. (Petition at 10-12, 16-18, 21.) Judge Adams stated (A-4) that the Third Circuit's decision in this case represents a "significant extension" and "substantial expansion" of the Second Circuit's decision in *Alcoa*. [Rule 17.1(a).]

B. The Issues Presented to This Court Were Preserved Below.

Columbia claims that the issues were not raised below in either the district court or the court of appeals. This is false. Kaiser preserved its position under the price-squeeze test established in *Alcoa* in both the district court and court of appeals and in its Petition for Rehearing.

The petition argues that the writ should be granted because the Third Circuit's decision extends the *Alcoa* "price-squeeze" doctrine to non-monopoly "price leadership." (Petition at 16-21.) Within this argument, Kaiser makes three points in its Petition, all of which were preserved below, as is reflected in the following comparison:

Point 1: The Third Circuit's decision improperly departs from the existing "price-squeeze" doctrine defined in *Alcoa*, which held that proof of monopoly power in raw material is an essential element of a "price squeeze." (Petition at 18).

Kaiser's contentions below:

1. (a) *Kaiser's Petition for Rehearing and Suggestion for Rehearing In Banc* before the Third Circuit at 5 (virtually identical language as in Petition).

(b) *Kaiser's Brief in the Third Circuit* at 18 (*Alcoa* requires proof of monopoly power in a raw material market).

(c) *Kaiser's Motion for Judgment Notwithstanding the Verdict* at 5357a (failure to prove domination and control over the raw material, aluminum coil).

(d) *Kaiser's Motion for a New Trial* 5357a (failure to instruct there was no price squeeze given the lack of evidence of market power over coil).

(e) *Kaiser's Motion for a Directed Verdict* at 5199a (no evidence of Kaiser's domination of sale of coil or control of coil price).[3]

Point 2: The Third Circuit's decision improperly imposes liability for a "price squeeze" on a company that was not supplying raw material to the fabricator allegedly squeezed. (Petition at 18).

Kaiser's contentions below:

2. (a) *Kaiser's Petition for Rehearing and Suggestion for Rehearing In Banc* at 8 (Kaiser never sold coil to Columbia after April, 1971).

(b) *Kaiser's Third Circuit Brief* at 18-19 ("It is uncontradicted that [Kaiser] did not sell one pound of coil to culvert customers in the Northeast in 1974, 1975 or 1976 (1453a-54a, 2621a-22a)."

(c) *Kaiser's Motion for Judgment Notwithstanding the Verdict* ("Columbia failed to prove that [Kaiser] sold aluminum coil to Columbia during the relevant time period.") (5361a, 5774a).

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3. Additionally, Kaiser requested that the jury be given binding instructions that Kaiser could not be liable for a price squeeze because Kaiser did not supply coil to Columbia during the alleged squeeze period (5288a).

(d) *Kaiser's Motion for a New Trial* ("[t]here was no evidence that [Kaiser] made sales of aluminum coil to Columbia during the revelant time period".) (5356a, 5779a-80a).

(e) *Kaiser's Motion for a Directed Verdict* ("It is undisputed that [Kaiser] did not sell coil to Columbia after June, 1971.") (5199a).

Point 3: The Third Circuit's decision improperly imposes liability for "price squeeze" when a producer lacks monopoly power in the raw material market. (Petition at 18).

Kaiser's contentions below:

3. (a) *Kaiser's Petition for Rehearing and Suggestion for Rehearing In Banc* at 8 ("There is no proof here (as there was in Alcoa's absolute control of the aluminum *ingot* market) that Kaiser possessed monopoly power in a relevant 'raw material' market.")

(b) *Kaiser's Third Circuit Brief* at 18 ("Here, Kaiser did not have *monopoly* power in the manufacture and sale of coil, . . . A price squeeze could not occur in the absence of monopoly power at the first level.")

(c) *Kaiser's Motion for Judgment Notwithstanding the Verdict* at 5362a ("Columbia failed to prove that [Kaiser] dominated any market for aluminum coil") (5774a).

(d) *Kaiser's Motion for a New Trial* at 5357a (The court erred in refusing to instruct the jury that, as a matter of law, the jury was not to consider the issues of a price squeeze by Kaiser because "there was no evidence that [Kaiser] had any market power as respects aluminum coil") (5779a-80a).

(e) *Kaiser's Motion for a Directed Verdict* at 5199a ("Columbia failed to adduce evidence that [Kaiser] 'dominated' the sale in the relevant geographic area of coil from which pipe is fabricated.")

With respect to the second question presented by the petition, Kaiser demonstrates that price leadership cannot be proven by uncontradicted evidence showing substantial differences in competitors' raw material prices and the timing of their price changes.[4] (Petition at 25-26). This, too, was preserved in the Third Circuit in strikingly similar language on pages 15-16 of Kaiser's Petition for Rehearing and Suggestion for Rehearing In Banc.

Columbia's waiver argument is unsupportable.

III. *ASPEN SKIING* IS NOT RELEVANT.

Columbia argues that "all of Kaiser's contentions have been effectively refuted by this Court's opinion in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, ___ U.S. ___, 105 S.Ct. 2847 (1985)." But, *Aspen Skiing*, unlike this case, did not concern either the

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4. In footnote 18 of its Brief in Opposition, Columbia ironically cites a pricing chart as support for the proposition that there was price leadership by Kaiser. (8080a). That very same chart was shown to Columbia's economic expert witness who concluded that price leadership "would be difficult to establish from this chart alone." (699a). The economist merely stated the obvious. *Not once* during the squeeze period did Alcoa, Columbia's supplier, follow a pricing change by Kaiser. This simple fact has never been disputed by Columbia. While Columbia contends that Alcoa's prices to Columbia were "usually" within one cent of the prices published by Kaiser, Columbia does not tell the Court that one cent is a substantial difference in the price of coil, which is quoted on a per pound basis. In fact, one of the respondents, Joseph Bonjorno, testified that one-half of one cent represents a substantial difference in coil prices. (156a).

"price-squeeze" theory of antitrust liability or an expansion of the *Alcoa* case. *Aspen Skiing* was a refusal to deal case.[5]

Columbia next contends that *Aspen Skiing* rejected a claim that the lower court's judgment "rested on an abstract legal proposition about the 'duty' to cooperate with rivals," and that, accordingly, Kaiser's petition should be similarly rejected because the Third Circuit "did not announce a 'duty' concerning pricing of both raw materials and finished goods." This completely misapplies the relevant portion of the holding in *Aspen Skiing*. There, this Court agreed with the petitioner that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor," but found that the judgment did not rest on that proposition because the trial court had "unambiguously instructed the jury" on the absence of such a duty. 105 S.Ct. at 2856. That is not the case here. Rather, the Third Circuit substantially expanded the price-squeeze theory, deviated from *Alcoa*, and held that price squeeze liability could be founded upon price leadership, not possession of monopoly power.

Columbia also recites *Aspen Skiing's* holdings on predatory intent. This is irrelevant to the specific issues

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5. In an effort to lend an air of credibility to its *Aspen Skiing* argument, Columbia emphasizes its contentions relating to an alleged "refusal to deal" by Kaiser. But, Kaiser never refused to fill a Columbia order (424a), and Columbia never claimed that the alleged "refusal" ever had an adverse impact on Columbia's business. Columbia had adequate alternative suppliers in Alcoa and Reynolds for identical materials (241a), at *lower* prices (155a-156a), and after Columbia switched sources of supply from Kaiser to Reynolds, Columbia's business "was on the increase" and "kept growing" (185a). Moreover, Columbia's alleged damages commenced on June 1, 1973, whereas the refusal was alleged to have occurred in April 1971, two years earlier. (182a-83a). Finally, there is no jury finding that Kaiser refused to deal or that any such refusal caused injury to Columbia.

on the price-squeeze theory which are raised by the petition. Whether predatory intent is an element of a price squeeze is not raised here. Rather, the focus is on whether "price leadership" by one of several substantial producers can be substituted for monopoly power; and, even if so, whether price leadership can be found in the face of clear evidence of substantial differences in competitors' prices and the timing of price changes.

Moreover, Columbia's contention that Kaiser offered no evidence of business justification or efficiency reasons for its pricing is simply groundless. The 1974 price increases for coil were explained by uncontradicted evidence that demand was high for aluminum, which was in short supply, requiring some manufacturers to go on allocation (286-87a; 434a, 451a-55a), and by the fact that in early 1974, government price controls were removed permitting sellers to increase prices for the first time in several years. (2276a). Lower pipe prices were likewise explained by uncontested evidence that there existed a recession in the construction industry (290-91a), and by the fact that opening the New Castle facility reduced Kaiser's costs (2381-82a, 2386a).

IV. WITHOUT PRICE SQUEEZE COLUMBIA'S CASE IS NOT SUFFICIENT TO WARRANT AFFIRMANCE.

Columbia erroneously contends that "[a] resolution of the narrow price-squeeze issues presented by [Kaiser] would have no effect on the outcome of this case," suggesting that other anticompetitive practices, apart from the price squeeze, could form the basis for liability under Section 2 of the Sherman Act.[6] Columbia provides no reasoned response to Kaiser's statement (Petition at 26

6. The five acts were asserted to be: (1) a refusal to sell coil to Columbia; (2) taking on Robert A. Kennedy as a distributor; (3) opening a pipe-making facility in New Castle, Delaware; (4) imposing a price squeeze; and (5) inducing Columbia to install a spiral pipe-making machine with a ½ by 2 corrugation specification.

n.22) as to why the remaining acts were insufficient to support liability under Sherman Act §2.[7] But, even if Columbia's contrary assertion were correct, reversal on the price-squeeze claim would preclude affirmance of the judgments below.

Columbia's theory of liability consisted of allegations of five different acts by Kaiser, which allegedly comprised the exercise of monopoly power in aluminum culvert pipe. However, the liability jury's verdict did not specify which of the five was the basis for its verdict or the cause of injury. Moreover, all five acts, including the alleged price squeeze, were put to the new jury in the retrial on the issue of damages; and Columbia's claimed amount of damages was calculated by hypothesizing a market free of the effects of the alleged price squeeze. Columbia never advanced a theory of injury and damage that did not focus on the alleged price squeeze.[8]

In these circumstances, reversal on the price-squeeze claim would require a new trial on both liability and damages, even if the Section 2 case could properly have gone to the jury. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 499-500 (1931);

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7. *See also* P. Areeda, *Antitrust Law* ¶729.9 at 227 (Supp. 1982), criticizing the earlier Third Circuit opinion discussing the hiring of Kennedy and the change in location of Kaiser's new culvert manufacturing plant:

> . . . [a] change of mind or the failure of management to accept the credit recommendation or construction plans of lower-level officials hardly proves an impropriety. Indeed, by allowing the jury to speculate on the defendant's motives, the court suggests a "compete at your peril" policy.

8. The district court described the increase in the price of coil that allegedly caused a price squeeze as being "crucial to this litigation" (A-42), a comment overlooked by Columbia when it stated that the district court "did not even mention the testimony concerning the price squeeze" in concluding that the evidence supported a Section 2 violation (Brief in Opposition at 13). The court of appeals also stressed the price squeeze in its conclusory paragraph as to liability (A-19-20).

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962); *Northeastern Telephone Co. v. AT&T*, 651 F.2d 75, 94-96 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

CONCLUSION

The petition for a writ of certiorari should be granted to resolve the important issues concerning the "price-squeeze" doctrine of antitrust liability.

Respectfully submitted,

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